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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID SAXTON,

Defendant and Appellant.

B205479

(Los Angeles County
Super. Ct. No. TA080465)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Eleanor J. Hunter, Judge. Affirmed.

Gerald Peters, under appointment by the Court of Appeal, for Defendant
and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Victoria B.
Wilson and Noah P. Hill, Deputy Attorneys General, for Plaintiff and Respondent.

David Saxton appeals from judgment entered from an order of the superior court revoking his probation and sentencing him to five years in prison on a drug possession conviction. The probation revocation proceeding was conducted simultaneously with Saxton's trial on weapons possession charges. Prior to trial, the court granted Saxton's request to represent himself during the proceedings. The court also granted Saxton ancillary services including an investigator and funds for materials. A few days before trial began Saxton sought the appointment of advisory counsel, but the court denied the request. On the first day of trial, Saxton unsuccessfully sought a continuance and reappointment of legal counsel. The jury was unable to reach a verdict on the weapons charges and the court granted a mistrial. The court, however, determined that the evidence presented at trial demonstrated that Saxton had violated a condition of his probation, prohibiting him from possessing a firearm, and as a result revoked Saxton's probation and sentenced him to prison on his prior conviction.

On the appeal before this court, Saxton asserts that a number of errors occurred both prior to and during the trial on the weapons possession counts. Specifically Saxton claims (1) that the trial court failed to determine whether he was mentally competent to represent himself; (2) he was denied an opportunity to prepare for trial because he lacked access to the law library and was unable to retain an investigator; (3) the court erred in denying his request for advisory counsel and/or reappointment of counsel; and (4) the court erred in denying his motion to continue the trial. As we shall explain, none of Saxton's claims have merit. In any event, Saxton has not demonstrated how any these alleged errors undermined the trial court's discretionary determination to revoke his probation. Accordingly, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Prior Drug Possession Conviction. In August 2005, Saxton was arrested and charged with possession of marijuana for sale. The information also alleged that he had two prior strike convictions and had served three prior prison terms.

In January of 2006, Saxton pled no contest to the charge and admitted the truth of the prior prison term allegations. The court accepted his plea and found him guilty. The

trial court dismissed the prior strike allegations pursuant to Penal Code¹ section 1385, suspended imposition of sentence and placed Saxton on summary probation for three years.

Weapons Possession Charges. On July 14, 2006, two Los Angeles Police Department (LAPD) officers responded to a report of a disturbance at a housing complex. When the officers arrived they saw Saxton and two other people standing in the parking lot of the complex. When Saxton saw the officers, he immediately began running through the complex. The officers chased Saxton.

One officer, Officer Taylor pursued Saxton, while the other police officer, Officer Pearce ran around the opposite side of the complex in anticipation that he could cut off Saxton's path. While Officer Taylor chased from 30 to 35 feet behind Saxton, the officer saw Saxton reach into his waistband and remove a black firearm. Officer Taylor yelled out to his partner that Saxton had a gun. Officer Pearce also saw Saxton carrying a firearm. Saxton ran towards a gap between a building and a fence. He threw the gun into a nearby bush as he continued to run from Officer Taylor. Saxton was soon apprehended by Officer Pearce. Officer Taylor remained at the location where he saw Saxton throw the weapon. The officers recovered a .45-caliber semiautomatic firearm. The firearm was not registered to Saxton, and latent fingerprint testing failed to reveal any prints from the weapon.

Saxton was arrested and charged with being a felon in possession of a firearm (Count 1); carrying a loaded firearm (Count 2); and carrying a concealed firearm (Count 3). The court also revoked appellant's probation in the prior drug possession case and set the prior conviction for a probation violation hearing.

Pre-Trial Proceedings. On August 1, 2006, Saxton's counsel declared a doubt as to Saxton's mental competency and the court suspended the criminal proceedings pursuant to section 1386. After a subsequent psychiatric examination revealed Saxton was not competent to stand trial, Saxton was committed to Patton State Hospital.

¹ All statutory references are to the Penal Code unless otherwise indicated.

On May 16, 2007, Saxton was found mentally competent and the criminal proceedings against him were reinstated. Saxton was arraigned on the weapons charges and pled not guilty. The court set the weapons charges for trial and ruled that the evidence for the probation revocation determination would be heard simultaneously with the trial on the weapons charges.

On August 9, 2007, Saxton sought to have his counsel removed and filed a request to proceed in pro per. After a hearing conducted pursuant to *People v. Faretta*, the court denied his request. On August 16, 2007, Saxton again sought the removal of his counsel and requested permission to represent himself. Saxton prepared a written declaration expressing his concerns about his counsel's preparation of his defense. The court considered the request, noting that it appeared to be thoughtful and articulate. The court granted Saxton's request to represent himself during the trial and the probation revocation proceedings. The court continued the matter for 10 days so that Saxton could determine what he needed to do to prepare for trial.

Saxton returned to court on August 28, 2007, and asked that he be appointed an investigator and funds for materials. Saxton also indicated that he had not yet been given access to the law library. The court remarked that Saxton would be given access to the library and use of the telephone as the Sheriff's Department policies permitted, and granted \$40 in funds. Saxton was given the list of approved investigators and the court indicated that it would order the appointment of the investigator chosen by Saxton. At the end of the hearing, Saxton chose a Robert Freeman as his investigator. The court ordered the case continued.

On September 9, 2007, when Saxton appeared in court he indicated that he was not prepared to proceed, but had not prepared a written motion to continue. Thereafter, Saxton filed a motion to continue on September 10, 2007. At the subsequent pre-trial hearing on September 14, 2007, Saxton told the court that he had been unable to work with his investigator, Mr. Freeman because Freeman said he did not have the appointment and in any event had too many other cases to handle. Saxton asked the court to appoint him a different investigator. Saxton chose Randle Later as his new

investigator, and the court appointed Mr. Later. Saxton also complained to the court that the investigator who worked with his lawyer had made errors in the witness statements that needed to be corrected, and that he had not received his court-ordered funds. The court stated that it would order that the funds be placed in Saxton's account and stated that Saxton's new investigator could make corrections in the witness statements. Saxton further complained that he did not get all of the access that he wanted to the law library and that he was at the mercy of the Sheriff's Department to have access. The court explained to Saxton that one of the risks of proceeding in pro per was that he would not have the same resources as an outside lawyer. The court granted Saxton's request for a 30-day continuance.

On October 19, 2007, at Saxton's request the court conducted a pre-trial hearing on a number of motions Saxton had prepared, including motions for: (1) appointment of advisory counsel; (2) to exclude evidence or dismiss pursuant to a section 995 motion; (3) discovery; (4) additional funds; and (5) to continue for additional time to prepare and work with an investigator. The court granted Saxton's request for additional funds (\$62) for materials after he presented receipts showing his expenditure of the funds he had been previously given. Saxton also told the court that he had called a number of investigators but all of them were too busy to help him. Saxton stated that he needed an investigator to subpoena his witnesses. The court denied Saxton's pre-trial motions.

The matter was sent out for trial on October 23, 2007. Saxton filed another motion to continue for three weeks on the grounds that he needed the assistance of an investigator and wanted the gun tested for finger prints. Saxton contended that the witness statements prepared by the prior investigator were done incorrectly and that he knew this because he had spoken to his witness. The court observed that it appeared that even without an investigator Saxton had been able to prepare, and would be able to correct the statements. The court denied the motion to continue. Saxton conceded that he had access to legal research on the computer and had access to the law library, though

he wanted more access. The court issued an order that Saxton be given access at the end of the court day.²

Thereafter the parties discussed a number of other pre-trial matters, including Saxton's request that one of his witnesses, Meredith Sims, who was his caretaker and with him shortly before his arrest, be permitted to testify concerning Saxton's mental condition at the time of the incident. Saxton wanted to present evidence that he ran from police because he was schizophrenic and had not taken his medication. The court denied his request concluding that his mental illness was not relevant to the issue of whether he possessed a weapon.

Thereafter, Saxton requested reappointment of counsel. The court took the matter under submission during the noon recess. In the afternoon, when the proceedings resumed, the court discussed the request. The court noted that it had examined the entire case file and that it appeared that Saxton had prepared a number of motions, which were unsuccessful, but were prepared well and put forth solid arguments. The court noted that Saxton had done a competent job representing himself and was articulate. The court further noted that a jury was waiting and that it appeared that Saxton was prepared but wanted merely to delay the proceedings. Thus the court denied his request.

The Trial. During the trial the prosecution presented the testimony from the two LAPD officers who arrested Saxton.³ Saxton presented testimony from Ms. Sims, his caregiver. She testified on the evening of Saxton's arrest, she and Saxton had dinner at a friend's house and then watched a movie. She testified that Saxton wore pajamas, but put on his clothes when they left. She testified that Saxton did not have a weapon that evening. She and Saxton walked home and en route, they passed in front of the

² Saxton subsequently reported that he was being given access to the library during the trial.

³ On October 26, two days after the trial began, Saxton told the court that he was too mentally ill to continue the trial. The court suspended the trial and ordered that Saxton immediately undergo a mental evaluation. After the evaluation revealed Saxton was competent, the trial resumed.

apartment complex. As they walked, an unidentified man ran passed them (from the parking lot area) as if he was being chased by someone. She testified that Saxton became startled because he had not taken his medication and immediately began to run. Sims testified that a few seconds later two LAPD officers ran from the direction of the parking lot and began chasing Saxton. Sims waited around for a few more minutes, but Saxton did not return and she did not see him when he was arrested.

Saxton called another witness to testify, but that witness invoked his right under the Fifth Amendment and refused to testify.

The jury could not reach a verdict; the jury deadlocked during deliberations. The court granted a mistrial.

Probation Revocation Proceeding. On November 1, 2007, the court conducted proceedings on the probation violation. The court noted that Saxton had been granted the right to represent himself during the trial on the weapons possession charges and in connection with the probation revocation hearing. The court gave Saxton the opportunity to present any additional evidence with respect to the probation violation, but Saxton had no additional evidence. The court explained to Saxton that the probation revocation determination was a matter of the court's discretion and that the court was not bound by the fact that the jury could not reach a verdict on the weapons charges. The court stated that it based its determination on the evidence presented at trial. The court found that based on the testimony of the LAPD officers, Saxton possessed a firearm on July 14, 2006, and that his possession of the weapon violated a condition of his probation. The court revoked Saxton's probation imposed on his prior conviction. Thereafter, on November 16, 2007, the court sentenced Saxton to 5 years in prison on his prior drug possession conviction.

Saxton appeals from the judgment upon the order revoking his probation.

DISCUSSION

Before this court, Saxton asserts that errors occurred during the trial on the weapons charges. First he claims that the court erred in failing to determine whether he was competent to represent himself. Second, he claims he was denied ancillary services

in preparing for trial. Third, Saxton claims that the court should have appointed him advisory counsel to assist him during the trial. Fourth, he asserts the court should have granted his request for reappointment of counsel. Finally, he argues the court should have granted him a continuance so that he could obtain legal counsel. We address these claims in turn.

I. Competency Determination.

In August 2006, after Saxton was arrested on the weapons possession charges, a psychiatric examination revealed Saxton was not competent to stand trial. The criminal proceedings were suspended and Saxton was committed to Patton State Hospital. On May 16, 2007, appellant was found mentally competent and the criminal proceedings against him were reinstated. On August 16, 2007, Saxton sought for the second time to relieve his legal counsel and requested permission to represent himself. Saxton prepared a written declaration expressing his concerns about his counsel's preparation of his defense. The court considered the request, noting that it appeared to be thoughtful, and therefore granted Saxton's request to represent himself during the trial and the probation revocation proceedings.

Saxton now claims the court erred in failing to determine whether he was mentally competent to represent himself when the court granted his *Faretta* [v. *California* (1975) 422 U.S. 806] motion. Specifically, Saxton claims his case is governed by *Indiana v. Edwards* (2008) 554 U.S. __ [128 S.Ct. 2379] (*Edwards*). In *Edwards*, the United States Supreme Court concluded a trial court may constitutionally deny a defendant the right of self-representation, though the defendant is competent to stand trial. The court held: “[T]he Constitution permits States to insist upon representation by counsel for those competent enough to stand trial under *Dusky* [v. *United States* (1960) 362 U.S. 402 (*Dusky*)] but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves.” (*Edwards, supra*, 554 U.S. at p. __ [128 S.Ct. at p. 2388].)

The California Supreme Court's recent decision in *People v. Taylor* (2009) 47 Cal.4th 850 (*Taylor*), controls here.⁴ In *Taylor* the Supreme Court rejected the defendant's claim that the trial court erred by failing to apply a *higher* standard of mental competence and granting his motion for self-representation in his 1996 trial because "at the time . . . state law provided the trial court with no test of mental competence to apply other than the *Dusky* standard of competence to stand trial" and "definitive federal case law rejected the idea that 'competence to . . . waive the right to counsel must be measured by a standard that is higher than (or even different from) the *Dusky* standard[.]'" (*Taylor*, *supra*, 47 Cal.4th at pp. 879-880, italics added.)

Edwards had not been decided at the time Saxton made his motion for self-representation and thus the court did not have a different standard to apply to the question of defendant's competence to represent himself. (See *Taylor*, *supra*, 47 Cal.4th at pp. 879-880.) Thus, the court did not err in failing to assess whether, in addition to Saxton's competence to stand trial, Saxton was also mentally competent to act as his own counsel.

In any event, it does not appear that Saxton was mentally incompetent to represent himself. He filed a number of pre-trial motions, including several motions to continue, a section 995, a suppression motion, a motion for discovery and advisory counsel. His motions are detailed; they cite to relevant law and contain sound legal arguments. The fact that he did not prevail on these motions, does not show that he was mentally incompetent. Rather it merely demonstrated that the motions lacked merit. His oral and written arguments demonstrated a level of competence and acumen equal to that of any pro per. The court also observed on the record that Saxton had ably defended himself. Indeed, the jury deadlocked on the underlying charges. There is nothing in this record to

⁴ We note Saxton's reference to a Ninth Circuit case, *United States v. Ferguson* (9th Cir. 2009) 560 F.3d 1060, decided prior to *Taylor*, in which the appellate court remanded the matter to the federal district court to determine whether *Edwards* would have affected the court's decision to represent himself. *Ferguson* involved a violation of federal criminal law, tried in a federal court under federal legal standards. *Taylor*, not *Ferguson*, is binding on this court. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

demonstrate that Saxton suffered from such a mental impairment during these proceedings such that he would have been found incompetent to represent himself in the trial under any standard.

II. Ancillary Services.

Saxton further claims he was denied a right to prepare his defense because he was denied access to the law library and was not able to retain an investigator. We do not agree.

The California Supreme Court has recognized “[a]s for the Sixth Amendment, . . . that depriving a self-represented defendant of ‘all means of presenting a defense’ violates the right of self-representation. [Citation.] Thus, ‘a defendant who is representing himself or herself may not be placed in the position of presenting a defense without access to a telephone, law library, runner, investigator, advisory counsel, or any other means of developing a defense.’ [Citation.]” (*People v. Blair* (2005) 36 Cal.4th 686, 733.) Nevertheless, “Institutional and security concerns of pretrial detention facilities may be considered in determining what means will be accorded to the defendant to prepare his or her defense.” (*People v. Jenkins* (2000) 22 Cal.4th 900, 1040.) “In the final analysis, the Sixth Amendment requires only that a self-represented defendant's access to the resources necessary to present a defense be reasonable under all the circumstances. [Citation.]” (*People v. Blair, supra*, 36 Cal.4th at p. 733.) In considering a claim of lack of access to the ancillary services necessary to present a defense, the “crucial question” is whether a self-represented defendant has had “reasonable access to the ancillary services that were reasonably necessary for his defense.” (*Id.* at p. 734.) To prevail on a claim that a self-represented defendant was denied access to ancillary services, the defendant must show not only error, but also resulting prejudice. (*Id.* at p. 736.)

Saxton has not shown he was denied access to the library. Saxton admitted that he had access to research materials and conducted legal research, including research using a computer, both before and during the trial. The fact that Saxton did not get all the research time he wanted is not the test under *Blair*. Saxton has not demonstrated that the

access he had was *unreasonable* under the circumstances. Likewise Saxton has not shown that he could not retain an investigator. Over the course of the two months Saxton had to prepare for trial he was appointed two different investigators. Although Saxton did not get to use his investigators to the effect he wanted, that does not demonstrate he was denied reasonable access to an investigator.

Assuming, without deciding, however, that Saxton had established a factual basis for his claim that he was denied reasonable access to these services, Saxton's claim that such denial violated his right to prepare for trial fails because he has not demonstrated prejudice. Saxton puts forth no argument as to how additional access to the law library would have helped his cause; he does not point to anything in the record that would suggest that additional legal research would have led to a different result.

As for his argument concerning an investigator, he claims an investigator would have located witnesses, interviewed them and subpoenaed them for trial and that such witnesses "might" have testified that the police chased the wrong person. Saxton, however, called to testify the only two witnesses ever identified at the scene. The record also indicates that Saxton interviewed his key witness, Ms. Sims, while he was incarcerated. Saxton does not argue, nor does the record indicate, that there were any other possible witnesses. Thus he has not shown how an investigator could have done more than Saxton was able to do while in jail. Finally, even had Saxton presented evidence showing that the police had been chasing a different person initially, Saxton's own witness, Ms. Sims testified that Saxton ran and both officers testified that they saw Saxton with the gun. Consequently, in view of the evidence presented, it is not likely Saxton would have obtained a more favorable result had he used the services of an investigator.

III. Request for Advisory Counsel.

A defendant does not have a constitutional right to advisory counsel. (*People v. Clark* (1992) 3 Cal.4th 41, 111.) "California courts have discretion to appoint advisory counsel to assist an indigent defendant who elects self-representation." (*People v. Crandell* (1988) 46 Cal.3d 833, 861, abrogated on other grounds in *People v. Crayton*

(2002) 28 Cal.4th 346, 364-365.) “The factors which a court may consider in exercising its discretion on a motion for advisory counsel include the defendant’s demonstrated legal abilities and the reasons for seeking appointment of advisory counsel.” (*People v. Crandell, supra*, 46 Cal.3d at p. 863.) If the record supports an inference that the motion for advisory counsel is manipulative, then the motion may be denied. (*Ibid.*; *People v. Clark, supra*, 3 Cal.4th at p. 112.) Thus, as with other matters left to the trial court’s discretion, “as long as there exists “a reasonable or even fairly debatable justification, under the law, for the action taken, such action will not be here set aside. . . .” [Citations.]” (*People v. Crandell, supra*, 46 Cal.3d at p. 863.)

Before this court, Saxton claims that given his lack of competence and inability to understand the court processes the court should have granted his request for advisory counsel. He is incorrect. First, the record from the trial court proceedings does not demonstrate Saxton was either incompetent or that he did not understand the court proceedings. On the contrary, the transcript shows Saxton understood the proceedings and competently prepared a number of written motions. Second, the basis for his motion for advisory counsel was that he wanted additional office supplies and that he “needed help.” The trial court denied the motion observing that Saxton had not articulated a sufficient reason to have counsel appointed. The court observed that it appeared Saxton had access to office supplies. The court additionally noted that the request was not well taken because the case was not factually or legally complicated or unusual. The court later remarked that it believed that his motion for advisory counsel had been a delay tactic. Later during the trial when Saxton renewed his request for an appointment of advisory trial counsel, the court denied it again, observing that Saxton had been doing a “great job” representing himself and that his motions and his ability to articulate his arguments indicated that he did not need advisory counsel.

The record supports the trial court’s exercise of discretion in denying Saxton advisory counsel. The grounds for Saxton’s original request (i.e., the need for supplies and a vague request for “help”) would not have warranted the appointment of advisory counsel. In addition, the court’s observations of Saxton’s abilities and skill find support

in the record. As discussed elsewhere, Saxton filed a number of motions in which he used the facts and law appropriately. (See *People v. Clark*, *supra*, 3 Cal.4th at pp. 111-112 [court properly denied request for advisory counsel where defendant displayed considerable skill and intelligence throughout the proceedings]; *People v. Sullivan* (2007) 151 Cal.App.4th 524, 554 [advisory counsel not warranted where defendant demonstrated his competence to act as his own attorney during pre-trial proceedings by making motions that related to the admission of evidence, discovery and the use of ancillary services].) Likewise, the court was further correct in observing the facts and issues presented in the case were not complex. Finally, the court's assessment that the request was an effort to delay the proceedings appears to be accurate in view of Saxton's prior conduct in the case. In view of all of the foregoing, we conclude that the trial court did not abuse its discretion in denying Saxton's requests for advisory counsel.

IV. Request for Reappointment of Counsel.

Saxton complains to this court that the trial court should have reappointed him counsel on the first day of trial. His argument on appeal is that he was not competent to represent himself given the fact that he could not get an investigator to help him prepare for trial. Saxton has not demonstrated error.

“[O]nce defendant has proceeded to trial on a basis of his constitutional right of self-representation, it is thereafter within the sound discretion of the trial court to determine whether such defendant may give up his right of self-representation and have counsel appointed for him.” (*People v. Lawrence* (2009) 46 Cal.4th 186, 192-193; *People v. Elliot* (1977) 70 Cal.App.3d 984, 993; *People v. Gallego* (1990) 52 Cal.3d 115, 164; *People v. Lawley* (2002) 27 Cal.4th 102, 149.) Among the factors a trial court should consider in ruling on a mid-trial request for appointment of counsel are, “(1) defendant's prior history in the substitution of counsel and in the desire to change from self-representation to counsel-representation, (2) the reasons set forth for the request, (3) the length and stage of the trial proceedings, (4) disruption or delay which reasonably might be expected to ensue from the granting of such motion, and (5) the likelihood of defendant's effectiveness in defending against the charges if required to continue to act as

his own attorney.” (*People v. Elliot, supra*, 70 Cal.App.3d at pp. 993-994; *People v. Gallego, supra*, 52 Cal.3d at p. 164.) Although useful, the *Elliot* factors are not absolutes. (*People v. Gallego, supra*, 52 Cal.3d at p. 164.) “[I]n the final analysis it is the totality of the facts and circumstances which the trial court must consider in exercising its discretion as to whether or not to permit a defendant to again change his mind regarding representation in midtrial.” (*Ibid.*) A trial court does not abuse its discretion in denying a mid-trial motion for the appointment of counsel when the request is an attempt to “control the proceedings.” (*People v. Clark, supra*, 3 Cal.4th at p. 112; *People v. Trujillo* (1984) 154 Cal.App.3d 1077, 1086-1087.)

In denying his request for reappointment of counsel, the court noted that it based its decision on the totality of the history of the case, including the fact that a jury was waiting, and the manner in which Saxton had conducted himself. The court noted that Saxton had a number of opportunities to seek reappointment of counsel before the start of trial, that he had been given ample time to prepare for trial, access to services, had filed a number of forceful and “well thought out” motions. The court observed that Saxton had been doing a great job in representing himself – that he was articulate, could express his arguments in writing and could put on an effective defense. The court stated its belief that Saxton had been trying to delay the case. The court’s observations and statements with regard to Saxton’s preparation for trial and his demonstrated abilities are borne out in the record. Saxton had a number of opportunities to seek reappointment before the first day of trial, and he was granted several continuances so that he could prepare for trial. The evidence in the record supports the inference that his motion for the reappointment of counsel was for the purpose of manipulating the court system. As such, the trial court did not abuse its discretion in denying the motion. (*People v. Trujillo, supra*, 154 Cal.App.3d at pp. 1086-1087.)

V. Continuance.

A continuance in a criminal case may be granted only for good cause. (§ 1050, subd. (e).) Whether good cause exists is a question for the trial court’s discretion. (*People v. Jenkins* (2000) 22 Cal.4th 900, 1037.) The court must consider ““not only the

benefit which the moving party anticipates but also the likelihood that such benefit will result, the burden on other witnesses, jurors and the court and, above all, whether substantial justice will be accomplished or defeated by a granting of the motion.””” (Ibid.) While a showing of good cause requires that both counsel and the defendant demonstrate they have prepared for trial with due diligence, the trial court may not exercise its discretion “so as to deprive the defendant or his attorney of a reasonable opportunity to prepare.” (*People v. Sakarias* (2000) 22 Cal.4th 596, 646.)

Before this court, Saxton asserts that the trial court erred in failing to grant a continuance for him “to obtain the appointment of counsel.” Saxton did not, however, seek a continuance for that purpose in the lower court,⁵ and thus, on appeal cannot be heard to complain that the trial court erred for failing to grant a continuance on grounds he did not raise below.

VI. Cumulative Error.

Saxton contends while the errors he asserts are individually sufficient to warrant reversal, taken together they violate appellant’s state and federal constitutional rights to due process and a fair trial. We disagree. As discussed elsewhere here, neither of these claims individually warrants reversal. Thus his claim of cumulative error necessarily fails as well. (*People v. Avila* (2006) 38 Cal.4th 491, 608.)

VII. Probation Revocation Determination.

As our discussion above demonstrates, none of Saxton’s claims have merit. But even if they did, he would not be entitled to reversal of the judgment on appeal because Saxton has failed to demonstrate how the errors he has articulated render the probation revocation determination infirm. To obtain a reversal of the revocation order, Saxton would need to show that the errors in the trial made the trial court’s subsequent probation revocation decision an abuse of discretion. He must show a causal connection between

⁵ His stated reason for a continuance was that he wanted more time to obtain the assistance of an investigator to correct witness statements and because he wanted to have the firearm tested for fingerprints. Saxton does not claim in this court that the trial court erred in failing to grant a continuance for the reasons he articulated in his motion.

the errors and the trial court's finding that he violated his probation. As we shall explain, he has failed to demonstrate such a connection.

Section 1203.2, subdivision (a), authorizes the trial court to revoke probation "if the interests of justice so require and the court, in its judgment, has reason to believe from the report of the probation officer or otherwise that the person has violated any of the conditions of his . . . probation."

"The judge is not determining whether the defendant is guilty or innocent of a crime. Rather, he [or she] must determine whether the convicted offender "can be safely allowed to return to and remain in society."'" (*In re Coughlin* (1976) 16 Cal.3d 52, 57.) As a result, "evidence which is insufficient or inadmissible to prove guilt at trial nevertheless may be considered in determining whether probation should be revoked." (*Id.* at p. 58.) Likewise, the court assessing a probation revocation can even consider evidence seized illegally. (*People v. Hayko* (1970 7 Cal.App.3d 604, 609-611.) In addition, the facts supporting probation revocation need only be proven by a preponderance of the evidence,⁶ and more lenient rules of evidence (as compared to criminal trials) apply. (*People v. Rodriguez* (1990) 51 Cal.3d 437, 447 (*Rodriguez*).) In a probation revocation proceeding, the trial court need only have "reason to believe" (§ 1203.2, subd. (a)) that the defendant violated probation. This is because "[r]evocation deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special [] restrictions.'" (*Id.* at p. 442.) It is "not part of a criminal prosecution." (*Ibid.*) "The court . . . need not wait until the defendant proves, by new acts of criminality, that the hope and expectation were unfounded. Acts short of criminality, or evidence which

⁶ Under that standard, the evidence need only show that "the existence of a fact is more probable than its nonexistence."'" (*In re Angelia P.* (1981) 28 Cal.3d 908, 918; see also, e.g., CACI No. 200 ["more likely to be true than not true"]; CALCRIM No. 852 ["more likely than not"].) In other words, to justify revoking probation for violating the obey-all-laws condition of probation, a trial court need only conclude that a defendant probably violated the law.

leaves a criminal violation still uncertain, may well, in the judgment of the court . . . , indicate that the hoped for rehabilitation is on the road to complete failure and that a more restrictive process is required both to protect society and to assist the defendant toward ultimate rehabilitation.” (*In re Coughlin*, *supra*, 16 Cal.3d at pp. 59-60, italics removed.)

Trial courts have “very broad discretion in determining whether a probationer has violated probation.” (*Rodriguez*, *supra*, 51 Cal.3d at p. 443.) “Such discretion ‘implies that in the absence of positive law or fixed rule the judge is to decide a question by his view of expediency or of the demand of equity and justice.’” (*Id.* at p. 445.) “[O]nly in a very extreme case should an appellate court interfere with the discretion of the trial court in the matter of denying or revoking probation.” (*Id.* at p. 443.) “‘To reverse a [probation] revocation order, the probationer must establish that the [trial] court abused its discretion.’” (*Id.* at p. 442.)

The problems with Saxton’s claim are several. First, he does not address the low standards of culpability and proof applicable at probation revocation proceedings. Second, Saxton has simply not demonstrated how the errors he asserts had any affect on the probation revocation determination. It is not enough to show that these errors occurred. His claims of error do not pertain to the probation condition that he violated. Indeed, he does not claim that a continuance, advisory counsel, the reappointment of counsel, or additional ancillary services would have allowed him to present different evidence or arguments. At most, Saxton argues that but for these errors he would have presented additional evidence of his mental condition and/or witnesses to explain that the police were chasing the wrong person. But none of this evidence is directly relevant to the weapons possession – the circumstance the trial court cited as the basis of its determination to revoke Saxton’s probation. Indeed, the evidence of Saxton’s weapons possession was substantial – two police eyewitnesses observed Saxton in possession of the firearm. Saxton has not shown how the various errors would have undermined or diminished the strength of the weapons possession evidence. Accordingly, given the court’s broad discretion and the standards governing this determination, it is not

reasonably likely the court would have come to a different determination but for these errors he asserts on appeal.

DISPOSITION

The judgment is affirmed.

WOODS, J.

We concur:

PERLUSS, P. J.

JACKSON, J.